

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

IN RE:)
)
EASTERN LIVESTOCK CO., LLC,) CASE NO. 10-93904-BHL-11
)
Debtor.)

**OBJECTION AND RESPONSE OF FIFTH THIRD BANK TO MOTION TO MODIFY
PLAN INJUNCTION TO PERMIT NAMING DEBTOR AS A DEFENDANT IN
COMPLAINT TO DETERMINE VALIDITY, EXTENT, AND PRIORITY OF LIENS
AND FOR ORDER DIRECTING PAYMENT OF COMMODITIES ACCOUNT
PROCEEDS TO THE FIRST BANK AND TRUST COMPANY FOR PURPOSES OF
ASSERTING DEBTOR'S INTEREST, IF ANY, THEREIN**

Fifth Third Bank ("Fifth Third"), by and through undersigned counsel, hereby objects and responds to the Motion to Modify Plan Injunction to Permit Naming Debtor as a Defendant in Complaint to Determine Validity, Extent, and Priority of Liens and for Order Directing Payment of Commodities Account Proceeds to the First Bank and Trust Company for Purposes of Asserting Debtor's Interest, if any, therein (Doc. No. 2476) (the "Motion"). In support of this Objection, Fifth Third respectfully states as follows:

OBJECTION

The relief sought by First Bank and Trust Company ("First Bank") is both premature and inappropriate. While couching its request as a limited procedural action to permit First Bank to name the Chapter 11 Trustee for Eastern Livestock Co. (the "Trustee") as a defendant in contemplated litigation (the "Proposed Litigation") over the rights to the cash in a "Commodities Account", the relief sought in the Motion instead seeks to preclude the Trustee from asserting any interest in or to the Commodities Account, and is also likely to result in severe consequences negatively impacting the administration of both the Eastern Livestock and Gibson Estates.

I. First Bank relies on a number of incorrect interpretations and unfounded presumptions in support of its Motion.

Fifth Third respectfully states that the basis for First Bank's Motion rests exclusively on inaccurate readings of applicable statutory provisions and unsupported assumptions made about applicable filings in both the Eastern Livestock bankruptcy proceeding (Case No. 10-93904) and the Chapter 7 Case of Thomas P. Gibson and Patsy M. Gibson (Case No. 10-93867) (the "Gibson Case").

a. First Bank incorrectly asserts that the Trustee has only asserted Avoidance Claims against the Gibson Estate.

As a threshold matter, First Bank incorrectly alleges that the only claims the Trustee may hold against the Gibson Estate constitute claims under 11 U.S.C. §§ 544, 547 and/or 548 (the "Avoidance Claims"). As the Trustee notes explicitly in proof of claim 48-1 filed in the Gibson Case, the Trustee holds a claim against Thomas P. Gibson in the amount of \$2,653,522.98 on account of a promissory note (the "Note Claim"). *Claim 48-1*, ¶4. In addition, the Trustee notes that he possesses "other significant claims against the Gibsons, including, *without limitation*, claims for preferential and/or fraudulent transfers." *Claim 48-1*, ¶4. At no point does the Trustee indicate that his claims are *limited to* Avoidance Claims. Fifth Third would note, at a minimum, that the Trustee also possess claims for *turnover* under 11 U.S.C. § 543 as against the Gibson Estate to the extent that such estate presently holds property which is properly attributable to Eastern Livestock (the "Turnover Claim"). Neither the Note Claim nor the Turnover Claim constitutes an "Avoidance Claim". First Bank has thus erroneously concluded, contrary to the express language of the claim filed by the Trustee, that the Trustee's claims against the Gibson Estate consist *only* of claims for Avoidance Actions.

b. First Bank incorrectly asserts that operation of 11 U.S.C. § 546 precludes the Trustee from asserting the Avoidance Claims.

Operation of 11 U.S.C. § 546 is not a statutory bar to the prosecution of any claim. Rather, 11 U.S.C. § 546 provides a *defense* which may be raised in opposition to any actual prosecution by the Trustee of an Avoidance Claim. As a defense, rather than a jurisdictional or prosecutorial bar, the burden of both raising and establishing the applicability of 11 U.S.C. § 546 rests with the defendant when a complaint is actually brought by the Trustee asserting an Avoidance Claim. By the Motion, First Bank presumes that: (a) all potential hypothetical defendants have raised a defense premised upon 11 U.S.C. § 546; (b) such defenses are properly applicable; and (c) no “equitable tolling” or other argument could be raised by the Trustee which might defeat a defense asserted pursuant to 11 U.S.C. § 546. The availability, applicability, or success of *defenses* premised upon 11 U.S.C. 546 may not properly be adjudicated in the absence of a pending complaint and an answer. Accordingly, the issue of any § 546 defense is not ripe, and the ultimate availability or unavailability of any potential § 546 defense to Avoidance Claims does not support the granting of the relief requested by the Motion.

Finally, 11 U.S.C. § 546 does not operate as a defense to either the Note Claim or the Turnover Claim; by its language, § 546 applies only to those claims raised pursuant to 11 U.S.C. § 544, 547 and/or 548. Section 546 does not provide a defense to an action for turnover under 11 U.S.C. § 543, or a contract action premised upon an effort to enforce a promissory note. Section 546 would further fail to provide a defense to any *direct* claim asserted by Fifth Third in and to the Commodities Account.

c. First Bank incorrectly asserts that the Trustee has no “claim” as defined by 11 U.S.C. § 101(a)(5).

First Bank appears to have inadvertently truncated the definition of “claim” contained in 11 U.S.C. § 105(5)(a)¹: while a “claim” is defined, in part, a right to payment, such right to payment constitutes a claim regardless of “whether or not such right is reduced to judgment, liquidated, *unliquidated*, fixed, *contingent*, matured, *unmatured*, *disputed*, undisputed, legal, equitable, secured, or unsecured.” (emphasis added). First Bank’s apparent assertion that the Trustee is thus required to successfully prosecute an Avoidance Claim as a condition precedent to the existence of a “claim” against the Gibson Estate is not supported by the plain language of the Bankruptcy Code. *Motion*, ¶5 (“the avoidance of a transfer that gives rise to [a liability under 11 U.S.C. § 550] is a *condition precedent* to the existence of any such right to payment.”) (emphasis added).

In addition to textual concerns, Fifth Third also notes that First Bank has neglected to consider the existence of claims held by the Trustee *other than* the Avoidance Claims. As noted above, the Trustee holds, at a minimum, claims based on Mr. Gibson’s execution of a promissory note and claims for turnover under 11 U.S.C. § 543. First Bank’s narrow, unsupported reading of the definition of “claim” does not support the relief requested by the Motion.

d. First Bank prematurely asserts that the Trustee would not be able to “set off” any Avoidance Claim or other claim against hypothetical claims which may potentially be brought by the Chapter 7 Trustee for the Gibson Estate.

First Bank prematurely seeks to foreclose any defenses or set-offs which might otherwise be asserted by the Trustee to hypothetical claims not yet brought by the Trustee of the Gibson Estate. Without claims actually pending against the Trustee on behalf of the Gibson Estate, it is mere speculation to state that the Avoidance Claims, the Note Claim, the Turnover Claim, or any

¹ Fifth Third believes that First Bank inadvertently transposed the citation for 11 U.S.C. § 101(5)(a) as § 101(a)(5) in the Motion.

other claim held by the Trustee would not be capable of defensive use. This Motion is not the proper forum to decide the merits of hypothetical defenses not yet capable of being raised. Mere speculation does not support the relief requested by the Motion.

e. First Bank incorrectly asserts that the confirmed Plan does not contemplate enjoining the filing of the Proposed Complaint.

As discussed in detail herein above, First Bank presumes that the Trustee holds no possible claim against the Gibson Estate and, thus, the Trustee's participation in the Proposed Litigation would be in name only. Thus, concludes First Bank, the injunction contained in Plan Article 7.5 is not intended to prohibit the commencement of the Proposed Litigation. Notwithstanding the erroneous presumptions underlying such conclusion, Fifth Third submits that it is precisely the piecemeal litigation efforts implicated by the Proposed Litigation which the injunction of Article 7.5 is designed to prohibit.

II. The present Motion is a procedurally inappropriate mechanism to address the relevant issues.

Fifth Third notes that the Proposed Litigation also seeks to improperly adjudicate the validity of the Trustee's claim, filed at 48-1 in the Gibson Case. The Motion, at its heart, does not seek limited procedural relief from the injunction of Article 7.5; rather, the Motion devotes the majority of its argument to seeking to invalidate the Trustee's claim to the Commodities Account. The instant Motion is not the proper procedural mechanism for the adjudication of the validity of a proof of claim filed in a *separate case*. The Trustee's filing of claim 48-1 constitutes prima facie evidence of its validity, unless and until a proper objection thereto is filed. *11 U.S.C. § 502(a); Fed. R. Bankr. P. 3001(f)*. Due process requires that any objection to the validity of claim 48-1 be properly commenced and prosecuted *in the case in which such claim is pending*.

First Bank further appears to presume that Fifth Third holds no independent claim to the Commodities Account; that Fifth Third's rights in and to the Commodities Account exist only as a derivative of the Trustee's rights in and to the Commodities Account. This presumption is incorrect. Fifth Third holds an *independent* claim to the Commodities Account based upon Mr. Gibson's confessed defrauding of Fifth Third (for theft and conversion of property of Fifth Third) – a crime for which Mr. Gibson is presently serving time in prison. First Bank's premature and procedurally improper efforts to "pre-adjudicate" rights in and to the Commodities Account must fail.

CONCLUSION

For the reasons stated herein, Fifth Third submits that the relief requested by the Motion should be DENIED.

Dated March 5, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 2014, a copy of the foregoing *Objection* was filed and served electronically through the Court's CM/ECF System to the following parties who are listed on the Court's Electronic Mail Notice List. Parties may access this filing through the Court's ECF System.

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